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STATUS OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS

Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights

Note by the Secretary-General

1. At its fifty-second session, the Commission on Human Rights took note of the measures taken by the Committee on Economic, Social and Cultural Rights towards the elaboration of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights granting the right of individuals or groups to submit communications concerning non-compliance with the Covenant, as recommended by the World Conference on Human Rights, and requested the Committee to submit a report on the matter to its fifty-third session (resolution 1996/16, para.10).

2. The Committee on Economic, Social and Cultural Rights continued and concluded its consideration of a draft optional protocol at its fifteenth session (E/C.12/1996/SR.44-49 and 54). The report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights is annexed to the present note.

ANNEX

Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights

Introduction

1. In the Vienna Declaration and Programme of Action the World Conference on Human Rights "encourage[d] the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to the International Covenant on Economic, Social and Cultural Rights" (Part II), para. 75). Although the reference is to "protocols" (in the plural) the only specific proposal before the Conference related to an optional communications procedure. This commitment was reiterated by the Commission on Human Rights which, in paragraph 6 of its resolution 1994/20, took note of the "steps taken by the Committee ... for the drafting of an optional protocol ... granting the right of individuals or groups to submit communications concerning non-compliance with the Covenant, and invite[d] the Committee to report thereon to the Commission ...." A brief progress report (E/CN.4/1996/96) on these deliberations was submitted to the Commission on Human Rights at its fifty-second session. The Commission, in paragraph 5 of its resolution 1996/11, welcomed the information and took note of the steps taken by the Committee.

2. The preparation of an optional protocol was first discussed in the Committee in 1990 and the matter has been formally under consideration by the Committee since its sixth session. 1/ In the following year the adoption of such a protocol was expressly recommended by Mr. Danilo Türk, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the realization of economic, social and cultural rights, in his final report (E/CN.4/Sub.2/1992/16, para. 211). Subsequently, four separate reports were prepared at the Committee's request by Mr. Philip Alston and provided the basis for extensive discussions within the Committee. 2/

3. The present report reflects the outcome of the discussions held by the Committee over the course of a number of sessions. In particular, the Committee conducted in-depth discussions based on a specific set of draft proposals from its eleventh to its fifteenth sessions. 3/ It adopted the present report at its fifteenth session. In doing so the Committee decided

that while it would prefer wherever possible to adopt a consensus position in relation to the issues under consideration, its report would also reflect divergent viewpoints whenever these could not be brought together in a consensus position. In the course of the Committee's discussions one of its members - Mr. Grissa - indicated that he was opposed to the proposal to draft an optional protocol. His views are reflected in the summary records, in particular E/C.12/1996/SR.42.

4. The present report provides an analysis of the issues that will need to be examined by the Commission on Human Rights in its consideration of the proposed optional protocol. It takes account of the comments made by members of the Committee in the course of its various discussions and, in particular, reflects the outcome of the Committee's deliberations at its fifteenth session. Careful note was taken in the course of those deliberations of very helpful oral and written submissions by the International Labour Organization, the United Nations Division for the Advancement of Women and the representatives of various non-governmental organizations, as well as of the report of an expert meeting convened in Utrecht by the Netherlands Institute for Human Rights in January 1995 to discuss the draft protocol. 4/

5. Before considering the issues that arise in relation to the content of a draft optional protocol to the Covenant, it is appropriate to consider briefly the broader setting in relation to which such an examination must take place.

I. PARALLEL DEVELOPMENTS IN RELATION TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

6. The World Conference on Human Rights called upon the Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women to "quickly examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women" (Part II, para. 40). Subsequently, an expert meeting was convened under independent auspices at the University of Maastricht in the Netherlands from 29 September to 1 October 1994 and which adopted a comprehensive draft optional protocol. The general lines of this draft were subsequently endorsed by the Committee on the Elimination of Discrimination against Women (CEDAW) at its fourteenth session. 5/

7. At its fortieth session, in March 1996, the Commission on the Status of Women established an open-ended sessional working group to examine the issue.

The working group held a general exchange of views, followed by an in-depth consideration of the major issues arising from the proposal. The Commission recommended the renewal of the working group's mandate for 1997 and requested the Secretary-General to prepare two reports dealing respectively with a comparative survey of other comparable international procedures and a synthesis of the views expressed on the issue by Governments and inter-governmental and non-governmental organizations. 6/

II. SIMILAR DEVELOPMENTS IN RELATION TO REGIONAL HUMAN RIGHTS TREATIES

8. In the context of the Organization of American States, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador, of 1988), which provides for a limited complaints procedure, has now been ratified or acceded to by six States and will enter into force upon acceptance by five more. Pursuant to Article 19 (6):

> "Any instance in which [the right to organize trade unions and the right to education] are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Articles 44 through 51 and 61 through 69 of the American Convention on Human Rights."

9. Of even greater direct relevance is the adoption in June 1995 by the Council of Europe of an Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. 7/ As with the proposed optional protocol to the International Covenant on Economic, Social and Cultural Rights, the new procedure is viewed only as a supplement to the reporting mechanism, which remains the primary means of supervising compliance with the Charter. Complaints alleging "unsatisfactory application of the Charter" cannot be submitted by individuals in their own right. Instead, they must be submitted by one of the following groups: (1) designated "international organizations of employers and trade unions"; (2) "other international non-governmental organizations which have consultative status with the Council of Europe and have been put on a list established for this purpose" by a Governmental Committee; (3) "representative national organizations of employers and trade unions" within the State against whom the complaint is directed (art. 1); and (4) "any other representative

non-governmental organization" designated by the Government concerned to lodge complaints against it (art. 2). Groups in categories (2) and (4) may only submit complaints in respect of matters regarding which "they have been recognized as having particular competence" (art. 3). The complainant is required to indicate "in what respect the [Contracting Party] has not ensured the satisfactory application" of a specified provision of the Charter (art. 4).

10. The complaint is initially examined by the Committee of Independent Experts, established under the Charter. Having determined that the complaint is admissible, the Committee calls for observations from both sides as well as from other Parties to the Protocol and category (1) organizations (art. 7). It then reports on whether or not the State's application of the relevant provision of the Charter has been "satisfactory" (art. 8). The report is sent confidentially to the parties concerned, all Parties to the Charter and the Council of Europe's Committee of Ministers. Within four months thereafter it must be sent to the Parliamentary Assembly and made public. On the basis of the report, the Committee of Ministers adopts a resolution and, if the conclusions of the Committee of Independent Experts are negative, addresses a recommendation to the State concerned (art. 9). The latter is required to report "on the measures it has taken to give effect to the ... recommendation" (art. 10). The Protocol will enter into force upon acceptance of 5 member States of the Council of Europe, of which there are currently 40.

III. PRELIMINARY CONSIDERATIONS

11. At its seventh session the Committee adopted a consolidated "analytical paper" which it submitted to the World Conference on Human Rights (A/CONF.157/PC/62/Add.5, annex II). In addition to that analysis, the Committee made the following submission in its general statement to the Conference:

> "The Committee believes that there are strong reasons for adopting a complaints procedure (in the form of an optional protocol to the Covenant) in respect of the economic, social and cultural rights recognized in the Covenant. Such a procedure would be entirely non-compulsory and would permit communications to be submitted by individuals or groups alleging violations of the rights recognized in the Covenant. It might also include an optional procedure for the consideration of inter-State complaints. Various procedural safeguards

designed to guard against abuse of the procedure would be adopted. They would be similar in nature to those applying under the first Optional Protocol to the International Covenant on Civil and Political Rights" (A/CONF.157/PC/62/Add.5, annex I, para. 18).

12. In its "analytical paper" the Committee emphasized the following aspects of the proposed optional protocol:

(a) Any protocol to the Covenant will be strictly optional and will thus only be applicable to those States parties which specifically agree to it by way of ratification or accession;

(b) The general principle of permitting complaints to be submitted under an international procedure in relation to economic, social and cultural rights is in no way new or especially innovative, given the precedents that exist within the International Labour Organization, United Nations Education Scientific and Cultural Oganization, the resolution 1503 procedure of the Economic and Social Council, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador, of 1988), and proposals currently under consideration within the Council of Europe;

(c) Experience to date with a wide range of existing international petition procedures indicates that there is no basis for fears that an optional protocol will result in a vast number of complaints;

(d) Under an optional protocol procedure the State party concerned retains the final decision as to what will be done in response to any views adopted by the Committee; and

(e) That if the principle of the indivisibility, interdependence and interrelatedness of the two sets of rights is to be upheld in the work of the United Nations, it is essential that a complaints procedure be established under the International Covenant on Economic, Social and Cultural Rights, thereby redressing the imbalance that presently exists.

IV. AN ANALYSIS OF THE POSSIBLE PROVISIONS OF AN OPTIONAL PROTOCOL

13. The following analysis is based primarily on the Committee's deliberations at its fifteenth session while also drawing upon its earlier discussions between 1991 and 1996. It also draws heavily on the approach adopted in existing communications procedures under United Nations human rights treaties, and particularly the first Optional Protocol to the International Covenant on Civil and Political Rights.

14. After a lengthy discussion the Committee decided not to recommend the inclusion of an inter-State complaints procedure within the proposed optional protocol. It was noted that such a procedure is included in various of the other core human rights treaties such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. All such procedures apply only between States which have mutually accepted the relevant procedure. The report submitted to the Committee at its fifteenth session summarized the different perspectives on this issue in the following terms:

> "In principle, there are good reasons to include such a procedure within the optional protocol. It would increase the options available for dealing with economic, social and cultural rights and it would put those rights on a par with those dealt with in the instruments listed above. In practice, however, there are also strong reasons that militate against the inclusion of such a procedure. Those that already exist under comparable United Nations human rights treaties have never been used and Governments have consistently been wary of what has been referred to as 'a Pandora's Box, which all parties prefer to keep shut'. 8/ Even in the ILO the two procedures for inter-State complaints (under art. 26 of the Constitution and under the freedom of association procedure) have only been used four times and once, respectively. This explains why such a procedure has not been proposed in relation to the draft optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women."

A. Preamble

15. The Preamble to the first Optional Protocol to the International Covenant on Civil and Political Rights consists of a single paragraph. For present purposes it would seem appropriate not to depart significantly from the basic simplicity of this approach. However, since the proposed protocol is not being adopted at the same time as the Covenant (as was the case in relation to the first Optional Protocol to the International Covenant on Civil and Political Rights), it is desirable to indicate some of the reasons for establishing an additional procedure. These relate to the interdependence of the two sets of rights, the contribution of the World Conference on Human Rights, the role of the Committee on Economic, Social and Cultural Rights, the

importance of recourse procedures in relation to these rights, the relationship between this protocol and the international community's broader economic and social development objectives, and the nature of the obligations specified in article 2 (1) of the Covenant.

16. The proposed text of the Preamble is:

"The States Parties to the present Protocol,

"[a] Emphasizing that social justice and development, including the realization of economic, social and cultural rights, are essential elements in the construction of a just and equitable national and international order,

"[b] Recalling that the Vienna Declaration and Programme of Action recognized that 'all human rights are universal, indivisible and interdependent and interrelated',

"[c] Emphasizing the role of the Economic and Social Council, and through it the Committee on Economic, Social and Cultural Rights (hereinafter referred to as the Committee) in developing a better understanding of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Covenant) and in promoting the realization of the rights recognized therein,

"[d] Recalling the provision of article 2 (1) of the Covenant pursuant to which 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures',

"[e] Noting that the possibility for the subjects of economic, social and cultural rights to submit complaints of alleged violations of those rights is a necessary means of recourse to guarantee the full enjoyment of the rights,

"[f] Considering that, in order further to achieve the purposes of the Covenant and the implementation of its provisions, it is appropriate to enable the Committee to receive and examine, in accordance with the provisions of this Protocol, communications alleging violations of the Covenant,

"Have agreed as follows: ...."

B. The scope of the Committee's competence

1. Questions of terminology

17. In communications procedures generally the first article contains the undertaking pursuant to which a State party recognizes the competence of the Committee to receive communications. It is traditional in such texts to distinguish between the receipt of a communication (which does not necessarily imply that it will subsequently be examined) and the consideration, or examination, phase (which occurs once the various procedural requirements have been met). The first Optional Protocol to the International Covenant on Civil and Political Rights uses both the latter verbs - "consider" and "examine" - without implying any clear distinction. Given the Human Rights Committee's practice of referring to the "examination" of communications, that verb is used in the following draft proposals.

18. The Committee recommends that the Protocol should refer to a "violation ... of ... the rights set forth in the International Covenant", thereby following the wording of article 1 of the first Optional Protocol to the International Covenant on Civil and Political Rights. The report submitted to the Committee at its fifteenth session also noted various other options which had been put forward:

> "[One option is to] refer to a failure by the State party to give effect to its obligations under the Covenant (as proposed in the Maastricht draft referred to in para. 4 above, and which amounts to a hybrid version of the different forms of terminology used in article 41 of the Covenant on Civil and Political Rights in relation to inter-State complaints). Other options are to follow the wording of the Additional Protocol to the European Social Charter and refer to a failure to ensure the satisfactory application of a provision or to adopt a formulation proposed by the ILO which would refer to those 'who allege failure by that State party to secure the observance of any of the rights'. In the case of the Covenant, all but the first of these formulations might be read as applying not only to the rights recognized in articles 1 to 15 but also to the procedural obligations contained in Part IV of the Covenant relating to reporting, etc. It is not clear, however, that it is desirable for individuals to be able to bring a communication against a State party on the grounds that it has failed to report in a timely

fashion, or at all. While such behaviour clearly constitutes a violation of the State's obligations, there are alternative means by which the Committee has sought to address such problems.

"A requirement that a 'violation' be alleged would not have the effect of exposing a State party to a successful complaint solely by virtue of its failure to ensure to a specific complainant the full realization of a given right. The obligation of the State under the Covenant, and thus the question of whether a violation had occurred, would still depend upon the facts of the case and a consideration of the implications of the terminology used both in the substantive provision recognizing the right and in article 2 (1) of the Covenant defining the nature of the obligation. There would thus seem to be no reason not to follow the approach used in the first Optional Protocol to the Covenant on Civil and Political Rights of referring to a violation. The only qualification would be to use the term 'recognized' rather than 'set forth', in view of the different terminology used in each of the Covenants."

2. Individuals and/or groups as complainants

19. The next question dealt with by the Committee was whether an individual should be permitted to submit a communication. In this regard it was noted that the Additional Protocol to the European Social Charter had excluded this possibility and adopted a restrictive list of group-based complainants. In the course of a full discussion of this option, all members of the Committee who contributed to the debate agreed that the inclusion of an individual right to petition was essential. It was also recalled in this regard that, already at its seventh session, the Committee had indicated a "strong and clear preference for an individual" focus (A/CONF.157/PC/62/Add.5, annex II, para. 66).

20. A related issue was whether groups, one or more of whose members claimed to be a victim of a violation, should also be permitted to submit complaints. In this regard the Committee recalled the reference in Commission on Human Rights resolution 1994/20 to "granting the right of individuals or groups to submit communications" (para. 6), and noted that the Human Rights Committee has, in practice, dealt with many communications submitted by individuals on behalf of affected groups and vice versa. It was thus agreed that groups should be included among those alleged victims entitled to submit complaints.

21. The proposed text of article 1, based on the decisions reflected in the preceding analysis is:

"A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and examine communications from any individuals or groups subject to its jurisdiction in accordance with the provisions of this Protocol."

C. Right to submit a communication

1. Third parties acting "on behalf of" alleged victims

22. The next issue is whether "standing" to submit a communication should be extended to "third parties", or, in other words, individuals and groups who, although not themselves victims of a violation, have what is deemed "a sufficient interest" in the matter (to use the phrase used in the CEDAW draft). The report submitted to the Committee at its fifteenth session noted in this regard that:

"This broad approach is not necessary merely in order to permit a communication to be submitted by another person or group on behalf of an individual claiming to be a victim of a violation. The Human Rights Committee has consistently interpreted article 1 of the first Optional Protocol [to the International Covenant on Civil and Political Rights] to accommodate that situation - an approach which is clearly reflected in rule 90 (1)(b) of the Committee's rules of procedure. The broader formulation would therefore seem to envisage a situation in which a public interest group or some other type of non-governmental organization might be authorized by the protocol to bring a complaint without having to identify and act with, or on behalf of, an individual or group claiming to be a victim of a violation. While this would have the advantage of permitting complaints which sought to anticipate violations, whether imminent or merely possible, it would also broaden considerably the scope of the obligation assumed by States parties and would potentially open the door to speculative complaints.

"During discussions in the Committee it has been argued that any 'NGOs and other organizations' should be authorized to submit complaints. This would eliminate all requirements such as 'consultative status', links to the country concerned, or special knowledge or particular competence in relation to the issues raised. It would thus make the procedure much more easily accessible than is the case under the

European Social Charter and the ILO procedures. Even the non-treaty-based procedure under resolution 1503 has some limits in theory, although not in practice. The proposal would eliminate any need for a nexus between the complainant and the alleged violation. While it is clear that a 'wide open' approach to standing would increase the capacity of the procedure to address every possible issue of relevance, it would seem to come at the price of opening up the procedure to a vast number of complaints which do not have to satisfy any minimum requirements designed to filter out ill-informed or gratuitous complaints.

"... It should also be noted that the requirement to exhaust domestic remedies before lodging a complaint with an international body, which is a standard provision in relation to all comparable human rights complaints procedures (except that of the ILO), would make it somewhat illusory to eliminate the nexus between the complainant(s) and the State party."

23. In light of these considerations the Committee recommends that the right to submit a complaint should be extended also to individuals or groups who act on behalf of alleged victims. The Committee noted, however, that this formulation should be interpreted only to embrace individuals and groups who, in the view of the Committee, are acting with the knowledge and agreement of the alleged victim(s).

2. <u>The range of rights covered</u>

24. The next issue is whether the procedure should apply to all of the rights recognized in the Covenant or only to some of them. The report submitted to the Committee at its fifteenth session noted in this regard that:

"After canvassing four different options, the Committee's analytical paper submitted to the World Conference opted for an inclusive rather than a restrictive approach. However, in order to exclude the reporting obligations contained in part IV of the Covenant it is proposed to restrict the coverage of the procedure to the rights recognized in articles 1 to 15 of the Covenant. This approach has been supported by the Committee in its deliberations to date, except in relation to questions raised in relation to the right to self-determination recognized in article 1 and in relation to the rights recognized in article 15. It has been suggested that the inclusion of the former

could involve a grave danger of the procedure being misused. It may be noted that the right to self-determination is recognized in exactly the same terms in article 1 of the International Covenant on Civil and Political Rights and that it is subject to complaints under the first Optional Protocol to that Covenant. In practice, however, the Human Rights Committee has adopted a cautious or restrictive approach to its application. In relation to article 15, it would seem difficult to single it out for exclusion while retaining other formulations of equivalent generality."

25. The Committee recommends that the optional protocol should apply in relation to all of the economic, social and cultural rights set forth in the Covenant and that this would include all of the rights contained in articles 1 to 15. The Committee noted, however, that the right to self-determination should be dealt with under this procedure only in so far as economic, social and cultural rights dimensions of that right are involved. It considered that the civil and political rights dimensions of the right should remain the preserve of the Human Rights Committee in connection with article 1 of the International Covenant on Civil and Political Rights.

26. Another issue, closely related to the previous one, is whether provision should be made to enable States to accept the procedure provided for in the optional protocol either in relation to all of the provisions of articles 1 to 15 (a "comprehensive" approach) or only in relation to particular elements of the Covenant (a "selective" approach). The latter approach, sometimes referred to as a *smörgasbörd* or *à la carte* approach, could take either of two forms. The first would require States parties to indicate which provisions of the Covenant would not be covered by the procedure they have accepted by becoming a party to the optional protocol. Each State would thus have to "opt out" in relation to specified provisions if it wished to avoid the application of the optional protocol in relation to all of the rights recognized in the Covenant. The second would require them to "opt in" to the procedure in relation to provisions of the Covenant which they would specify upon becoming a party to the protocol. A further distinction was also noted in the report submitted to the Committee at its fifteenth session which observed that each of these selective approaches:

"could apply either to articles of the Covenant or, in an even more specific fashion, to specific rights. Thus, for example, under the

first approach, a State could identify article 11 as one in relation to which it would accept the complaints procedure (thus covering all of the elements - adequate standard of living, food, clothing, housing, etc. - dealt with in that article). Under the second approach it could identify a specific right such as the right to adequate food in relation to which it would accept the procedure. It should be noted that the adoption of a more restrictive coverage in the optional protocol would in no way diminish or otherwise affect the full range of obligations already applicable to every State party to the Covenant."

27. The same report noted the following advantages and disadvantages of permitting any type of selective approach:

"Its principal advantages are: (i) it enables States to tailor the extent of the obligations that they accept to fit the situation within the country, thus making it more feasible to accept the principle of a complaints procedure; (ii) it would facilitate a progressive acceptance of a wider range of rights over time; (iii) it would partly resolve the question of which rights are justiciable and to what extent by enabling States to resolve that issue for themselves and expanding their approach as the content of individual rights evolves with greater clarity; and (iv) it would make the procedure as a whole more manageable, and thus more acceptable, to a broader range of States.

"This option also has some clear disadvantages: (i) the approach might be perceived from a practical viewpoint, although not from a theoretical perspective, to challenge the principle that all rights are equally important; (ii) the approach would differ from the holistic one reflected in the first Optional Protocol to the International Covenant on Civil and Political Rights, although it would be consistent with the options given to States to accept some provisions, but not others, when ratifying the European Social Charter; and (iii) there is a risk States might initially opt to accept the procedure only in relation to an unduly narrow range of rights.

"Whatever approach is adopted in this regard, it would have to be assumed, given the fundamental importance of articles 2-5 of the Covenant, that they would always be fully applicable in relation to the interpretation of the meaning of any of the specific rights recognized in articles 6-15."

28. After a long debate over this issue the majority of the members of the Committee who participated expressed a clear preference for a comprehensive approach which would require any State becoming a party to the optional protocol to accept the relevant procedure in relation to all of the rights recognized in the Covenant. On the other hand, a strong minority favoured the adoption of a selective approach which would permit States to accept obligations only in relation to a specified range of rights. The minority considered that this could be achieved either through requiring States expressly to "opt out" of provisions that they would need to identify at the time of becoming a party to the protocol or through enabling them to "opt in" in relation to provisions which they would specify.

3. Protecting access to the procedure

29. A related issue concerns protection of the right to submit a complaint. The report submitted to the Committee at its fifteenth session put the issue in the following terms:

> "It is appropriate to include a provision which not only affirms the right of an individual or group to submit a written communication alleging a violation of the rights recognized in the Covenant, but also obliges States parties to do whatever is necessary to enable potential complainants to submit communications. The importance of this aspect of a complaints procedure has consistently been highlighted by the Commission on Human Rights in a series of resolutions since 1990. Based on a report of the Secretary-General [E/CN.4/1994/42], the Commission, in its resolution 1994/70, requested the treaty bodies to take urgent steps, in conformity with their mandates, to help prevent the hampering of access to United Nations human rights procedures in any way. The Commission also urged Governments to refrain from all acts of intimidation or reprisal against, inter alia, those who submit or have submitted communications under procedures established by human rights instruments. It therefore seems appropriate for a specific provision of this nature to be included in the protocol."

30. The Committee agreed that such a provision should be included.

31. The proposed text of article 2, based on the decisions reflected in the preceding analysis, is:

> "1. Any individual or group claiming to be a victim of a violation by the State party concerned of any of the economic, social or cultural

rights recognized in the Covenant, or any individual or group acting on behalf of such claimant(s), may submit a written communication to the Committee for examination.

"2. States Parties to this Protocol undertake not to hinder in any way the effective exercise of the right to submit a communication and to take all steps necessary to prevent any persecution or sanctioning of any person or group submitting or seeking to submit a communication under this Protocol."

D. Receivability and admissibility

32. Bringing together the various provisions relating to receivability and admissibility within a single article of the draft protocol would seem to be the most convenient approach. For the most part, these various procedural rules are based directly upon the formulations used in the first Optional Protocol to the International Covenant on Civil and Political Rights. For the purposes of this draft they have been reorganized slightly but the wording remains almost identical in its key provisions.

33. The proposed text of article 3 is:

"1. No communication shall be received by the Committee if it is anonymous or is directed at a State which is not a party to this Protocol.

"2. The Committee shall declare a communication inadmissible if it:

"(a) does not contain allegations which, if substantiated, would constitute a violation of rights recognized in the Covenant;

"(b) constitutes an abuse of the right to submit a communication; or

"(c) relates to acts and omissions which occurred before the entry into force of this Protocol for the State Party concerned, unless those acts or omissions:

"(i) continue to constitute a violation of the Covenant after the entry into force of the Protocol for that State party; or

"(ii) have effects which continue beyond the entry into force of this Protocol and those effects themselves appear to constitute a violation of a right recognized in the Covenant.

"3. The Committee shall not declare a communication admissible unless it has ascertained:

"(a) that all available domestic remedies have been exhausted; and

"(b) that a communication submitted by or on behalf of the alleged victim which raises essentially the same issues of fact and law is not being examined under another procedure of international investigation or settlement. The Committee may, however, examine such a communication where the procedure of international investigation or settlement is unreasonably prolonged."

E. Substantiation of complaints

34. In any complaints procedure there is an onus placed upon the complainant to provide information which gives substance to the allegations that have been made. Moreover, it is appropriate to provide the Committee with the opportunity to re-examine a communication if new information is provided to it after it has already taken a decision to declare the communication inadmissible on the basis of its first examination.

35. The proposed text of article 4 is:

"1. The Committee may decline to continue to examine a communication if the author, after being given a reasonable opportunity to do so, fails to provide information which would sufficiently substantiate the allegations contained in the communication.

"2. The Committee may, upon the request of the author of the complaint, recommence examination of a communication which it has declared inadmissible under article 3 if the circumstances which led to its decision have changed."

F. Interim measures

36. Although the first Optional Protocol to the International Covenant on Civil and Political Rights does not contain a specific provision dealing with interim measures, procedures which have been adopted subsequently by the Human Rights Committee have addressed this important issue. While the Committee does not consider it necessary or desirable to adopt a blanket provision which would apply in all cases, it considers it should be given the discretion, to be used in potentially serious cases involving the possibility of irreparable harm, to request that interim measures be taken.

37. The proposed text of article 5 is:

"If at any time after the receipt of a communication, and before a determination on the merits has been reached, a preliminary study gives rise to a reasonable apprehension that the allegations, if substantiated, could lead to irreparable harm, the Committee may request the State Party concerned to take such interim measures as may be necessary to avoid such irreparable harm."

G. Reference to State party and friendly settlement

38. The great majority of communications procedures provide for the possibility of reaching a friendly settlement with the State party concerned. Particularly in view of the nature of economic, social and cultural rights, it would seem especially appropriate to provide for a procedure of friendly settlement in the draft protocol. For this purpose the Committee would specifically indicate its preparedness to facilitate such a settlement, provided only that the resulting arrangement is based upon respect for the rights and obligations contained in the Covenant.

39. Another matter is whether to include a provision comparable to that contained in the International Convention on the Elimination of All Forms of Racial Discrimination (art. 14 (6) (a)) according to which "the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent". In the view of the Committee the possible need to protect the identity of the alleged victim(s) is a matter best taken care of in the relevant rules of procedure.

40. The other matter in this regard is the setting of a time-limit within which a State must respond to information received from the Committee. The first Optional Protocol to the International Covenant on Civil and Political Rights provides for a period of six months. Consideration was given in the Committee's earlier deliberations to setting a time-limit of three months. It was suggested that that would be conducive to achieving a prompt and equitable solution. The ILO and other sources made it clear, however, that three months would, in their experience, be too short a time for Governments to respond. The Committee therefore recommends that six months be retained.

41. The proposed text of article 6 is:

"1. Unless the Committee considers that a communication should be declared inadmissible without reference to the State party concerned,

the Committee shall confidentially bring to the attention of the State party any communication referred to it under this Protocol.

"2. Within six months, the receiving State shall submit to the Committee explanations or statements and the remedy, if any, that may have been afforded by that State.

"3. During its examination of a communication, the Committee shall place itself at the disposal of the parties concerned with a view to facilitating settlement of the matter on the basis of respect for the rights and obligations set forth in the Covenant.

"4. If a settlement is reached, the Committee shall prepare a report containing a statement of the facts and of the solution reached."

H. Examination of communications

42. The first Optional Protocol to the International Covenant on Civil and Political Rights specifies that the Committee shall base itself upon "all written information made available to it by the individual and by the State Party concerned" (art. 5 (1)). In practice this is a generous provision since it does not exclude information from any source provided only that it is specifically submitted by one party or the other. Nevertheless, it seems unduly restrictive and counterproductive for the Committee not to be able to take into account information which it has obtained for itself from other sources. The Committee recommends the inclusion of authorization for such action to be undertaken by it, on condition that any such information would also be provided to the parties concerned for comment.

43. Article 5 of the first Optional Protocol to the International Covenant on Civil and Political Rights does not specify the procedures to be used by the Committee in examining communications, other than to state that its consideration shall take place in closed meetings. It is unnecessary for the draft protocol to be any more detailed and it would seem to be sufficient to indicate that the Committee is empowered to adopt its own procedures for the consideration of communications and that such consideration should take place in private session. The only significant additional element recommended by the Committee concerns including the possibility of a visit to the territory of a State party as part of the Committee's examination of a communication. By providing such an option, to be employed only if the State party concerned

wishes to exercise it, the procedure would have the flexibility required to enable the Committee, in cooperation with the State party, to tailor the best approach under the circumstances.

44. It is also proposed to indicate that the final views of the Committee will be made public at the same time as they are communicated to the parties directly involved. This is consistent with the existing practice of the Human Rights Committee.

45. The proposed text of article 7 is:

"1. The Committee shall examine communications received under this Protocol in the light of all information made available to it by or on behalf of the author in accordance with paragraph 2, and by the State party concerned. The Committee may also take into account information obtained from other sources, provided that this information is transmitted to the parties concerned for comment.

"2. The Committee may adopt such procedures as will enable it to ascertain the facts and to assess the extent to which the State party concerned has fulfilled its obligations under the Covenant.

"3. As part of its examination of a communication, the Committee may, with the agreement of the State Party concerned, visit the territory of that State Party.

"4. The Committee shall hold closed meetings when examining communications under this Protocol.

"5. After examining a communication, the Committee shall adopt its views on the claims made in the communication and shall transmit these to the State party and to the author, together with any recommendations it considers appropriate. The views shall be made public at the same time."

I. Results of examination

46. While the first Optional Protocol to the International Covenant on Civil and Political Rights provides only that the Committee shall forward its views to the two concerned parties, the practice of the Human Rights Committee, as well as of other comparable complaints procedures, has developed very significantly in recent years in relation to the various follow-up procedures. It would therefore seem appropriate in drafting a protocol in the late 1990s to be more specific as to the recommendations that the Committee might make with a view to remedying any violation which it has identified. This approach

would be entirely consistent with the importance attached by the International Covenant on Civil and Political Rights to the provision of an appropriate remedy for violations, and with the approach proposed in the study prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning "the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms" (E/CN.4/Sub.2/1993/8).

47. Following the Committee's discussions, it is not recommended, however, to include a provision which would expressly obligate the State party concerned to implement the Committee's recommendations, to provide an appropriate remedy or to ensure the provision of adequate compensation where appropriate. While there is much to be said in policy terms for such measures, it is correct, as pointed out during the debates, that making such measures legally mandatory would transform the nature of the procedure from a quasi-judicial to a judicial one. In the latter case, more complex procedures in general would be necessary, including a greater variety of procedural safeguards for the parties concerned.

48. In paragraph 2 it is proposed to extend the relevant time-limit to six months for the same reasons cited in relation to article 6 (2) in paragraph 40 above.

49. The proposed text of article 8 is:

"1. Where the Committee is of the view that a State Party has violated its obligations under the Covenant, the Committee may recommend that the State Party take specific measures to remedy the violation and to prevent its recurrence.

"2. The State Party concerned shall, within six months of receiving notice of the decision of the Committee under paragraph 1, or such longer period as may be specified by the Committee, provide the Committee with details of the measures which it has taken in accordance with paragraph 1 above."

J. Follow-up procedures

50. Once again, while the first Optional Protocol to the International Covenant on Civil and Political Rights does not spell out the procedures which will be used in relation to following up on the adoption of views in particular cases, the Human Rights Committee has developed an extensive

procedure for this purpose. The Committee therefore recommends that such a procedure be reflected in the provisions contained in the proposed draft protocol.

51. The proposed text of article 9 is:

"1. The Committee may invite a State Party to discuss with it, at a mutually convenient time, the measures which the State Party has taken to give effect to the views or recommendations of the Committee.

"2. The Committee may invite the State Party concerned to include in its reports under article 17 of the Covenant details of any measures taken in response to the Committee's views and recommendations.

"3. The Committee shall include in its annual report an account of the substance of the communication and its examination of the matter, a summary of the explanations and statements of the State Party concerned, of its own views and recommendations, and the response of the State Party concerned to those views and recommendations."

K. Rules of procedure, servicing, etc.

52. In view of the fact that the text of the Covenant itself does not contain specific provisions relating to the adoption of rules of procedure, the meetings of the Committee or the responsibility of the Secretary-General for the servicing of the Committee, it is recommended that this lack be remedied in relation to the communications procedure provided for in the draft protocol. The Committee therefore proposes provisions comparable to those contained in other major human rights treaties.

53. The proposed text of article 10 is:

"The Committee may make rules of procedure prescribing the procedure to be followed when it is exercising the functions conferred on it by this Protocol."

54. The proposed text of article 11 is:

"1. The Committee shall meet for such period as is necessary to carry out its functions under this Protocol.

"2. The Secretary-General of the United Nations shall provide the Committee with the necessary staff, facilities and finances for the performance of its functions under this Protocol, and in particular shall ensure that expert legal advice is available to the Committee for this purpose."

L. Final articles

55. For the most part, the final articles recommended for inclusion in the present draft protocol follow closely those already contained in the first Optional Protocol to the International Covenant on Civil and Political Rights. Changes have been made only where this would seem necessary or appropriate for an instrument which may be adopted in the late 1990s rather than in 1966. In particular, the provisions requiring the Secretary-General to circulate the various documents and other information would seem to be superfluous today in view of the regular notification of States parties of all such developments.

56. The proposed text of the final articles is reproduced below. No commentary is offered at this stage in view of the fact that they are reasonably self-explanatory and that the Commission will need to resolve the more substantive matters dealt with in the earlier articles before finalizing these provisions.

57. The Committee discussed at some length the question of whether reservations to the optional protocol should be permitted or excluded, or whether the protocol should be silent in relation to that matter. The Committee agreed to recommend that it would be appropriate for the Commission to consider providing for the lodging of reservations if it opts for a comprehensive approach in relation to the range of rights, as described in paragraph 28 above.

58. The proposed text of the final articles is:

"Article 12

"1. This Protocol is open for signature by any State Party to the Covenant.

"2. This Protocol is subject to ratification or accession by any State Party to the Covenant. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

"Article 13

"1. This Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the fifth instrument of ratification or accession.

"2. For each State ratifying this Protocol or acceding to it after its entry into force, this Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

"Article 14

"1. This Protocol will be binding upon each State Party in respect of all territories subject to its jurisdiction.

"2. The provisions of this Protocol shall extend to all parts of federal States without any limitations or exceptions.

"Article 15

"1. Any State Party to this Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to this Protocol with the request that they notify him or her whether they favour a conference of State Parties for the purpose of considering and voting upon the proposal. If within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene such a conference under the auspices of the United Nations. Any amendment adopted by majority of the State parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

"2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to this Protocol in accordance with their respective constitutional processes.

"3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Protocol and any earlier amendment which they have accepted.

"Article 16

"1. Any State Party may denounce this Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

"2. Denunciations shall be without prejudice to the continued application of the provisions of this Protocol to any communication submitted before the effective date of denunciation.

"3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matters regarding that State.

"Article 17

"This Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations."

Notes

1/ See E/1992/23 - E/C.12/1991/4, paras. 360-366.

2/ E/C.12/1991/WP.2, E/C.12/1992/WP.9, E/C.12/1994/12, and E/C.12/1996/CRP.2/Add.1.

3/ See E/C.12/1994/SR.42, 45 and 56; E/C.12/1995/SR.5 and 50; E/C.12/1996/SR.19 and 20; and E/C.12/1996/SR.42-47.

4/ F. Coomans and G.J.H. van Hoof (eds.), Right to Complain About Economic and Social Rights (Utrecht, Netherlands Institute for Human Rights, 1995).

5/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 38 (A/50/38), chap. I Sect. B, suggestion 7. For a comprehensive analysis see A. Byrnes and J. Connors, "Enforcing the Human Rights of Women: A complaints Procedure for the Women's Convention", 21 Brooklyn Journal of International Law (1996) 679-797.

6/ See Official Records of the Economic and Social Council, 1996, Supplement No. 6 (E/1996/26) - E/CN.6/1996/15), annex III.

7/ See Council of Europe document H (95) 8 of 5 July 1995.

8/ Rosalyn Higgins, "Encouraging Human Rights", 2 London School of Economics Quarterly (1988) 249.